83-2072

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

DEAN J. LISINSKI, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SUPP

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Hobbs Act, 18 U.S.C. § 1951, is violated when fear of economic harm motivates payments of money, but the recipient has not threatened the payor, directly or indirectly.

2. May the Petitioner's engagement as an agent of the "victim" in a bribery scheme, unaccompanied by extortionate conduct toward the victim, constitute a violation of the Hobbs Act?

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The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 21, 1984, affirming the petitioner's conviction. The Court of Appeals denied a timely petition for rehearing on April 2, 1984. See Appendix hereto, p. 13-14.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix, p. 1. The District Court ruled verbally in convicting the petitioner. Transcript of Proceedings ("Tr."), Nov. 12, 1982, pp. 42-48, App. 15-29.

JURISDICTION

The judgment of the Court of Appeals (App. 1) was entered on February 21, 1984. A timely petition for rehearing was denied on April 2, 1984. App. 13-14. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

18 U.S.C. § 1951. Interference with commerce by threats of violence

(a) Whoever is any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extor-

tion or attempts or conspires so do to, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section -

* * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

* * *

STATEMENT OF THE CASE

After a trial without a jury in the United States District Court for the Northern District of Illinois, the petitioner, Dean Lisinski, was convicted

under three counts alleging violations of the Hobbs Act, 18 U.S.C. § 1951. 11/11/82 Tr. 47-48. As to two of the counts, the petitioner was convicted of receiving funds from Louis Patras which the lower courts found were paid out of fear of economic harm. The third count was founded on the same theory of economic fear but, as the funds were furnished by the government, the conviction was for attempted extortion. App. 2-3.

The "victim" in the case was Louis Patras, who testified he met the petitioner in 1976 or 1977 and that they became very good friends. 11/9/82 Tr. 56.

Mr. Patras had long worked in the restaurant and bar business. There he learned that by paying money he could get things to which he was not entitled. 11/10/82 Tr. 158. The Trial Judge found that Mr. Patras had a history of making

payoffs to accomplish his goals. 11/12/82 Tr. 43. In addition, Patras admitted involvement in a series of criminal frauds in the pertinent period of time. 11/10/82 Tr. 176-84, 198-202, 202-10; 11/9/82 Tr. 53-54.

In 1979 Mr. Patras was the operator of the William Tell II restaurant in Illinois. As such, it was his obligation to collect sales taxes from customers and hold them in trust for the state. Instead, he diverted the money to other uses and fell behind in his sales tax payments. 11/10/82 Tr. 195-97. Because of this delinquency, Patras expected that the agency responsible for the collection of the taxes, the Illinois Department of Revenue, would seek revocation of the restaurant's liquor license. He also knew that he could cure the problem by the payment of the back taxes, id. at 219-20, 223, 235-36, and regarded

retention of the liquor license as essential to the economic viability of the restaurant. 11/9/82 Tr. 49-52.

The Illinois Liquor Control Commission scheduled a hearing as to the liquor license shortly before it was due to expire in 1980. Id. at 59. Mr. Patras knew the petitioner held a public office. While the office was not concerned with liquor licenses, Mr. Patras knew the petitioner had friends in the two state agencies which dealt with such matters. Mr. Patras thus contracted Mr. Lisinski and asked for help in dealing with the agencies. Patras expected to pay for the political influence he hoped the petitioner could exert. 11/10/82 Tr. 221-22.

The petitioner then provided assistance to Mr. Patras and asked him for money with which to make payments to public officials. App. 2-3. Receipt of

that money led to the petitioner's conviction.

While the Court of Appeals referred repeatedly to "demands" for money made by the petitioner, id., he did not threaten Patras or even suggest that the latter's license problem would worsen if the payments were not made. The Seventh Circuit thus posed the appellate issue as being whether the Hobbs Act may be violated without a threat. App. 4. Finding that it is sufficient that a defendant prey upon or exploit the victim's fear of economic loss, id., the Court affirmed the conviction. "[N]o threat is necessary for the wrongful use of fear." App. 8.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S CONSTRUCTION OF THE HOBBS ACT

The Hobbs Act prohibits obstruction of commerce by extortion, which it defines as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear or under color of official right." 18 U.S.C. § 1951. Members and officials of labor unions, the defendants in United States v. Enmons, 410 U.S. 396 (1973), had been charged with extortion based on five specific acts of violence during a strike. Id. at 397-98. As in the present case, the Enmons prosecutors aspired to give extortion a new grasp: here to extortion without threats, there to the quest for "legitimate collective-bargaining demands." See id. at 408. Resolving the statute's ambiguity in favor of lenity and rejecting so great an incursion into States' criminal jurisdiction in the absence of plain Congressional lan-

guage, this Court demurred. Id. at 411.

Also like the present case, Enmons required an interpretation of the statutory term "wrongful." Not to make the term superfluous, the Court recognized that it must modify the end as well as the means of the putative extortion. For Enmons, the alleged violence incidental to a lawful strike was not extortionate because the end, a higher wage, was not wrongful. Id. at 400. The extortionate means in Enmons were force and violence, terms for which the statutory modifier "wrongful" are unnecessary. However, unlike force or violence, the uses of fear to obtain money are often not wrongful, as evidence sales of deodorant soaps, diet books and American Express travelers checks. This Court knew the legitimate uses of fear, but the Seventh Circuit did not. Here is what this Court said, together with the Seventh

Circuit's reading of it:

THIS COURT

For it would be redundant to speak of "wrongful violence" or "wrongful force" since, as the Government acknowledges, any violence or force to obtain property is "wrongful."

Emmons, 410 U.S. at 399-400.

SEVENTH CIRCUIT

Lisinski totally misreads Enmons. Enmons is simply authority for the proposition that since all means of obtaining property which involve actual or threatened force, violence or fear are wrongful, . . .

Lisinski, App. 6 (emphasis added).

By erroneously expanding the scope of the redundant "wrongful" to include fear, the Seventh Circuit relieved itself of the need to give any content at all to the statutory phrase "wrongful . . . fear." Instead, it begged the question, explaining "wrongful" with other ambiguous words: "Exploitation

of, or preying upon, the victim's fear constitutes wrongful use of fear and satisfies the statute." App. 6. In support it cited cases from the Fifth and Eighth Circuits, as well as an earlier Seventh Circuit decision. See id. at 6-7. But Lisinski is in fact in conflict with the cases it cited, for they make the wrongful use of fear depend on their defendants' threats, which may be subtle or implicit. None is authority for the Seventh Circuit's novel view that extortion through the wrongful use of fear of economic harm requires no threat at all.

Moreover, other courts have interpreted the Enmons limitation (ends must be illegitimate) to apply only in the labor context. If the ends are legitimate, but the context is not labor, a Hobbs Act violation may occur if the means are illegitimate. See United States v.

Russo, 708 F.2d 209, 215 (6th Cir.), cert. denied, ____ U.S. ____, 104 S. Ct. 487 (1983); United States v. Zappola, 677 F.2d 264, 269 (2d Cir. 1982); United States v. Porcaro, 648 F.2d 753, 760 (1st Cir. 1981); United States v. Cerilli, 603 F.2d 415, 419-20 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980); United States v. Warledo, 557 F.2d 721, 729-30 (10th Cir. 1977). The opinion in Enmons must mean that both ends and means must be illegitimate in the labor context; outside that context, only means need be illegitimate.

Finally, the Court made it clear in United States v. Green, 350 U.S. 415 (1956), that the Hobbs Act focuses on illegal means. There, the Court condemned certain labor action (threats of force and violence) because "[t]hose are not legitimate means for improving labor conditions." Id. at 420 (emphasis added.)

In contrast, in the instant case,

the Seventh Circuit interpreted the Court's opinion in Enmons to condemn all use of fear. App. 6. This interpretation ignores the language in Enmons that "wrongful" is redundant when applied to force and violence, not fear. 410 U.S. at 399-400. Moreover, by holding that no threat is needed, the Seventh Circuit interpreted the opinion in Enmons to mean that illegitimate means are never required for a Hobbs Act violation. This is in fact the opposite of the Court's holding. Enmons limited the statute's reach, holding that illegitimate ends must supplement illegitimate means in a labor context.

II.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT CREATED BY THIS CASE WITH LOWER COURTS' INTERPRETATIONS OF THE HOBBS ACT REQUIRING THREATS

The Hobbs Act prohibits anyone from

affecting commerce by robbery or extortion. Extortion is defined as the obtaining of property from another, with his consent, induced by the wrongful use of actual or threatened force, violence or fear, or under color of official right. The statute does not further define "wrongful use of fear."

However, case law has determined that "fear" includes fear of economic harm, and that the necessary "use" of the fear can be "exploitation" of an existing fear. E.g., United States v. Crowley, 504 F.2d 992, 996 (7th Cir. 1974). The issue here posed is whether the exploitation required by the Act includes a threat by the defendant to take retaliatory action if payments are not made.

LIVINGSTON v. LISINSKI

Like the Seventh Circuit in this case, the Eleventh Circuit in United States v. Livingston, 665 F.2d 1003 (1982),

needed to distinguish those uses of fear which do not constitute Hobbs Act extortion. Livingston knew about an on-going embezzlement scheme, but was not involved in it. In return for money, he offered to tell the victim about the scheme. The Eleventh Circuit reversed the conviction because "[i]n order to be guilty of the wrongful use of fear, . . . a party must cause, or threaten to cause the economic loss to occur." 665 F.2d at 1005. Conversely, the Eleventh Circuit held, "Offering to sell information concerning an embezzlement, without having any control over the embezzlement, and without threatening to cause the embezzlement to continue, may be morally repugnant but it doesn't constitute extortion as defined in 18 U.S.C. §1951(b)(2)." Id.

The Seventh Circuit's conflict with Livingston could hardly be more stark, for the petitioner Lisinski too made no

threats and had no control over the "victim's" fate. Nevertheless, "[t]he government argues . . . that no threat is necessary. The government suggests that extortion by wrongful use of fear of economic harm is established by showing that the defendant preyed upon or exploited the victim's fear of economic harm. We agree." App. 4.

The Seventh Circuit thus made threats merely decorative appendages in an extortion prosecution: "[A]lthough no threat is necessary for the wrongful use of fear, by the very nature of extortion cases, threats - particularly 'implied threats' will almost always be present." Id. at 8. Rejecting (without citing) the Eleventh Circuit's formula for distinguishing criminal acts from non-extortionate sales transactions, the Seventh Circuit offers no alternative means of discerning the boundaries of the crime.

Louis Patras -- the "victim" in the present case -- brought upon himself the fear of losing his liquor license when he converted his customers' sales tax payments to his own uses. Of course, it does not exculpate the petitioner that he did not cause the victim's fear. Id. at 6, quoting United States v. Crowley, 504 F.2d 992, 996 (7th Cir. 1974). But the fact that Mr. Patras was responsible for his own fear illuminates his real choices: He could pay his sales tax arrearage or he could try to arrange for it to be overlooked. True to his own traditions of bribery and fraud, he opted for the second. Lacking clout himself in the right high places, he enlisted an old friend he he thought had useful connections. Enter, the petitioner.

The petitioner stipulates that his conduct may have been "morally repugnant," like that of the defendant in Livingston,

665 F.2d at 1005. But a generally wrongful end does not extortion make. As Enmons teaches, 410 U.S. at 400, and the Seventh Circuit recognizes, Lisinski, passim, the means -- the use of fear -- must also be wrongful. Unfortunately the Seventh Circuit erred by going no further. It turned to synonyms more ambiguous than "wrongful," words that may be charged with criminal meaning but often aren't: "Exploitation of, or preying upon, the victim's fear constitutes wrongful use of fear and satisfied the statute." Id. at 6. The words may connote but mild criticism, applicable at the speaker's fancy to Playboy or Vogue, the Department of Defense or nuclear freeze advocates, perhaps even defense attorneys. Does Bar-Bri prey upon new law school graduates, exploiting their exaggerated fear of a bar exam? "The tyranny of labels must not lead us to leap to a conclusion that

a word which in one set of facts may stand for oppression or enormity is of like effect in every other." Palko v. Connecticut, 302 U.S. 319, 323 (1937). When, then, does preying upon another's fear become extortionate?

The answer lies in coercion. See United States v. Hathaway, 534 F.2d 386, 395 (1st Cir.), cert. denied, 429 U.S. 819 (1976). At common law, the holder of a public office was guilty of extortion when, by virtue of his post, he coerced payment for what he was duty bound to do. United States v. Nardello, 393 U.S. 286, 289 (1969). Logically some states extended criminal extortion to other forms of coercion. Id. In enacting the Hobbs act, Congress took its definition of extortion from the New York criminal law: "'the obtaining of property from another . . . with his consent, induced by a wrongful use of force or fear, or under

color of official right.' N.Y. Penal Law § 850 (1909). . . ." See Enmons, 410 U.S. at 406 n.16 and legislative history recounted therein.

The coercive use of fear demands a threat, as inseparably as clouds and rain. "The essence of the crime is obtaining property by a wrongful use of fear, induced by a threat to do an unlawful injury." People v. Dioguardi, 8 N.Y.2d 260, 268, 203 N.Y.S.2d 870, 877, 168 N.E.2d 683, 688 (1960)(construing Section 850 on which the Hobbs Act definition of extortion is based). The threat may be express. United States v. Sander, 615 F.2d 215, 219 (5th Cir. 1980)(quoted to the contrary by the Seventh Circuit in Lisinski, App. 6-7), cert. denied, 449 U.S. 835 (1980). It may be subtle. Sander, 615 F.2d at 218; see also United States v. Quinn, 514 F.2d 1250, 1266-67 (5th Cir. 1975), cert. denied, 424 U.S.

955 (1976)(defendant "selling his influence under the threat of picketing which would destroy his victim's business.") And the threat may be implicit in the defendant's power to bring to pass what the victim fears. Crowley, 504 F.2d at 998 (defendant policeman's implied threat to withhold needed police services); Callanan v. United States, 223 F.2d 171, 175 (8th Cir.), cert. denied, 350 U.S. 862 (1955)(defendant labor leaders created reasonable fear even if they were not responsible for past difficulties victim feared would recur.) The power to harm the victim need not be real, as long as the victim reasonably fears that the defendant can do so. United States v. Rastelli, 551 F.2d 902 905 (2d Cir.), cert. denied, 434 U.S. 831 (1977); see also United States v. Billups, 692 F.2d 320, 331 (4th Cir. 1982), cert. denied, ____ U.S. ____, 104 S. Ct. 84 (1983)

(payment "the direct result of a perceived, reasonable fear on [victim's] part that noncompliance with the deal already struck could lead to [defendant's] economic retaliation.")

But where extortion convictions have occurred without a threat, however subtle, and without the defendants' having the power or even the reasonably perceived power from which they might imply a threat, the Courts of Appeals have reversed. Livingston, 665 F.2d at 1005. See also United States v. Rabbitt, 583 F.2d 1014, 1027 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979).

They consistently reversed, that is, until the Seventh Circuit affirmed the petitioner's conviction by holding that no threat at all, not even an implied or subtle one, was required for extortion.

LISINSKI v. OTHER PRECEDENT

In the present case, the Seventh

Circuit asserted that "[c]ase law amply refutes Lisinski's arguments that the wrongful use of fear requires a threat." App. 6. In fact, the court's citations and quotations only evidence the danger that broad statements of principle sometimes outdistance the facts that gave them birth. H.K. Porter Co. v. NLRB, 397 U.S. 99, 110 (1970)(Douglas, J., dissenting). In holding that extortion can be proved where there was no threat or pressure at all, the Seventh Circuit eliminated coercion itself as the gravamen of the crime. In that, it stands alone among the circuits.

To refute the need for a threat, the Lisinski panel first cited an earlier Seventh Circuit case, Crowley, 504 F.2d at 996. In Crowley, however, the defendants were police officers who had the power to bring about the dearth of police services the victim feared. They had

been charged with extortion under color of official right. Id. at 994. As to its alternative holding on the charge of wrongfully using fear, Crowley stated that there had been an implied threat. Id. at 998.

Quoting Crowley, the Lisinski panel included its parapharse of the Eighth Circuit's decision in Callanan v. United States, 223 F.2d 171, 175 (8th Cir.), cert. denied, 350 U.S. 862 (1955). But the labor leader defendants in Callanan had argued only that their victim's fear pre-existed their extortionate demand. There was no evidence of express threats, but none was needed to make the victim's fear reasonable in the context of past labor problems. The Eighth Circuit saw that implicit threats could be just as effective: "It appears to us that the offense of extortion under the Hobbs Act has been committed if the defendants have

illegally created fear in their victim, which fear has induced the victim to part with his money or property." Id. (emphasis added.) The New York Court of Appeals cited Callanan v. United States in construing extortion to require a threat. People v. Dioguardi, 168 N.E.2d at 689. Callanan does not at the same time support the Seventh Circuit's refutation of the need for a threat.

Next Lisinski cites United States v. Gerald, 624 F.2d 1291, 1299 (5th Cir. 1980), cert. denied, 450 U.S. 920 (1981). In an abbreviated Hobbs Act discussion, Gerald does not consider whether threats are required for extortion. Like Callanan, it states that the victim's fear may have sprung from some other source than the defendant, and in support it cites United States v. Hyde, 448 F.2d 815, 833 (5th Cir. 1971), cert. denied, 404 U.S. 1058 (1972), a case that is rife

with threats both express and implicit, the latter dependent on the defendants' power to use the Alabama Attorney General's office to operate a massive extortionate scheme. Id. at 834.

Lisinski's next choice of a Fifth Circuit case also does not support the Seventh Circuit's reading threats out of the law of extortion. It quoted from United States v. Sander, 615 F.2d 215, 218 (5th Cir.), cert. denied, 449 U.S. 835 (1980), taking a long passage in which the Fifth Circuit noted that the defendant denied making threats. App. 7. But on the next page, the Fifth Circuit wrote that the "evidence at trial showed that [defendant] did threaten [the victim] with economic loss if he failed to supply the promised bribe money." Sander, 615 F.2d at 219. Sander is authority for the fact that threats may be subtle, id. at 218, but not that extortion is found

where there is no threat at all.

Lastly, the Seventh Circuit quoted from United States v. Duhon, 565 F.2d 345, 351 (5th Cir.), cert. denied, 435 U.S. 952 (1978). App. 7. Once again, however, its quote is too abbreviated. On the same page, the Fifth Circuit wrote that the "jury reasonably concluded that the threat of continued and perhaps expanded picketing absent a payoff was implicit in the actions of" the defendants. Id. (emphasis added).

By reading threats and, with them, coercion, out of the Hobbs Act definition of the wrongful use of fear, the Seventh Circuit in the instant case allows proscutions for extortion whenever a defendant's conduct may be more or less repugnant, disdaining this Court's insistence on resolving ambiguities carefully for the sake of lenity and federalism. Enmons, 410 U.S. at 411. In this case,

the Seventh Circuit has created a conflict with the Second, Fifth and Eighth Circuit cases it cited, as well as with the Eleventh Circuit's holding in Livingston, 665 F.2d at 1005, which it did not cite. Petitioner asks this court to resolve the conflict in his favor.

III.

CERTIORARI SHOULD BE GRANTED BECAUSE THE HOBBS ACT'S LEGISLATIVE HISTORY INDICATES THAT THE DEFENDANT MUST THREATEN THE VICTIM

The main purpose of the Hobbs Act was to provide an effective deterrent to labor violence. See 91 Cong. Rec. 11899-922 (1945); 89 Cong. Rec. 3191-3234 (1943); Report of the House Committee on the Judiciary, H.R. Rep. No. 238, 79th Cong., 1st Sess., (1945); H.R. Rep. No. 66, 78th Cong., 1st Sess., (1943); H.R. Rep. No. 2176, 77th Cong., 2d Sess., (1942).

However, it is also evident that Congress meant extortion as used in the Act to require a threat.

Representative Hobbs stated that the definition of extortion used in the Act is identical to the definition in N.Y. Penal Law § 850, (McKinney 1944). 91 Cong. Rec. 11900 (1945). The Court in Enmons agreed that the phrase "wrongful use of fear" was taken from this law. This law required a threat.

In a prosecution for extortion under section 850, a New York court stated, "The essence of the crime is obtaining property by a wrongful use of fear, indicated by a threat to do an unlawful injury." People v. Dioguardi, 8 N.Y.2d 260, 268, 203 N.Y.S.2d 870, 877, 168 N.E.2d 683, 688 (1960). It is not necessary that the defendant create the

fear, "so long as he succeeds in persuading [the victim] that he possesses the power to remove or continue its course, and instills a new fear by threatening to misuse that power as a device to exact tribute." Id. at 268, 203 N.Y.S.2d at 877, 168 N.E.2d at 689. The court cited Callanan v. United States, 223 F.2d 171, 174-76 (8th Cir.), cert. denied, 350 U.S. 862 (1955), a Hobbs Act case, to support its statement.

Similarly, in another New York extortion case, the court stated that one can extort by force or threat. People v. Weinseimer, 117 App. Div. 603, 604-05, 102 N.Y.S. 579, 580, aff'd, 190 N.Y. 537, 83 N.E. 1129 (1907). Thus, under the New York definition of extortion adopted in the Hobbs Act, one cannot extort without use of a force or a threat to retaliate.

IV.

CERTIORARI SHOULD BE GRANTED BECAUSE THE STATUTORY INTERPRETATION BY THE SEVENTH CIRCUIT VIOLATES THIS COURT'S DELINEATION BETWEEN FEDERAL AND STATE CRIMINAL JURISDICTION

Because the focus of the Seventh Circuit's interpretation that no threat is needed is on an act's illegitimate ends, it effectively federalizes considerable conduct heretofore cognizable only under state law. State crimes are "illegitimate" by definition; therefore, anyone who profits by such a crime may violate the Hobbs Act as well. But the Act was never meant so to expand federal jurisdiction, as previous opinions of this Court have noted.

In Enmons, the Court explicitly limited the scope of the Hobbs Act because it determined that the federal government was not meant to interfere unduly with the states' criminal jurisdiction. 410 U.S. at 411. Thus the Court made it

clear that Congress did not design the Hobbs Act for the purpose of federalizing state court crimes. Instead, the Act encompasses a new crime, which hinges on the obtaining of property through coercion, as well as an impact on commerce. Coercion, not the ends of a person's actions, is what makes the actions violative of the statute. Because the Hobbs Act adds a new element, coercion, the overlap with state crime does not expand to the extent disapproved by the Court.

The distinction between federal and state criminal jurisdiction must remain sharp. The Court has repeatedly asserted this position in a line of opinions beginning with Rewis v. United States, 401 U.S. 808 (1971). And see Williams v. United States, 458 U.S. 279 (1982). The opinion in Enmons was just one determination in a series of cases in which

the Court has made it clear that our federal system will not tolerate the absorption of state criminal jurisdiction. Language found in United States v. Bass, 404 U.S. 336 (1971), is particularly applicable to the instant situation: "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance;" "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States;" "the broad construction urged by the Government renders traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources." Id. at 349-50.

Hence, the rule in favor of lenity asserted in Enmons supplements this rule against federal absorption of state crime to militate against the expansive inter-

pretation adopted by the Seventh Circuit.

This Court's interpretation of the Travel Act also provides a relevant guide. Rewis warned against an unrestricted interpretation of the Travel Act because "[it] would alter sensitive federal-state relationship, could overextend limited federal police resources, and . . . would transform relatively minor state offenses into federal felonies." 401 U.S. at 812. Heeding this warning, the Second Circuit held that commercial bribery did not constitute bribery for purposes of the Travel Act. United States v. Brecht, 540 F.2d 45 (2d Cir. 1976), cert. denied, 429 U.S. 1123 (1977). To include commercial bribery within the ambit of the statute would distort the balance between federal and criminal jurisdiction. To include procurement of property without threats within the Hobbs Act's scope would produce a similar effect.

Nothing in the Hobbs Act's language remotely suggests that non-coercive use of fear should be considered within its scope. The definition of extortion as "wrongful use of fear" at least leaves an ambiguity which must be resolved by rules of construction that favor a limited federal jurisdiction.

In short, the illegal behavior which creates the Hobbs Act offense is coercion. This coercion must emanate from the defendant, by his exploitation of fear. Exploitation involves a retaliatory threat from the defendant -- extortion in the plain sense of the word. Without such a threat, an "illegitimate" claim to property probably constitutes a violation of state law. But the Act does not rise to the level of federal jurisdiction. Previous court interpretations, lower court holdings, legislative history, and rules of construction all favor a

requirement that a threat be proven.

V.

CERTIORARI SHOULD BE GRANTED BECAUSE THE HOBBS ACT DOES NOT CRIMINALIZE A BRIBERY SCHEME IN WHICH THE DEFENDANT ACTED AS AN AGENT OF THE PAYOR

The holding in Livingston, unlike that in the instant case, also is consistent with a line of cases that distinguish bribery from Hobbs Act extortion. United States v. Duhon, 565 F.2d 345 (5th Cir.), cert. denied, 435 U.S. 952 (1978); United States v. Pranno, 385 F.2d 387 (7th Cir. 1967), cert. denied, 390 U.S. 944 (1968); United States v. Kubacki, 237 F. Supp. 638 (E.D. Pa. 1965). Simple bribery does not constitute extortion. Duhon, 565 F.2d at 351; Pranno, 385 F.2d at 390; Kubacki, 237 F. Supp. at 641. Only when the bribery is supplemented with duress does a Hobbs Act violation occur. For example, in both Duhon and Pranno the

recipient of the bribe had made veiled threats. In Duhon a labor union official threatened expanded picketing. 565 F.2d at 351. In Pranno the defendant threatened to require an expensive drainage basin before approving a factory site. 385 F.2d at 390. Without this duress through a threat initiated by the defendant, as in Kubacki, no extortion occurs. There the defendant demanded a kickback in return for which he would grant contractors a city order. The court determined that the only fear generated in the contractors was that they would not be successful in exercising undue influence; "That is not the type of fear contemplated in § 1951." Kubacki 237 F. Supp. at 642.

These cases stand for the proposition that the Hobbs Act requires an element of duress through a threat from a defendant. Without such a threat, an act may constitute a state bribery violation, but does not

rise to the level of a federal offense. Thus "wrongful" in "wrongful use of fear" is interpreted to mean wrongful means to obtain property--through defendant coercion.

As noted above, p. 7, Mr. Patras sought the aid of the petitioner, expecting to pay, and received assistance. See App. 2. In making payoff money available to Mr. Lisinski, Patras intended that his wishes be carried out by Lisinski. Lisinski thus was an agent in the classic and legal sense. See Black's Law Dictionary 85 (4th ed. 1951).*

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* The Panel opinion found that while the record may have supported a prosecution for bribery, extortion also existed. It also rejected the petitioner's argument that the petitioner acted merely as Patras' agent. App. 8-9.

As to the position that the petitioner did not act as Patras' agent, consider the government's concession in the court below: "[T]hat Lisinski was acting on behalf of Patras in exerting influence over State officials is . . . not disputed. . . ." Brief for Appellee, p. 24. The impetus of the scheme,

Thus, it is incorrect, as well as inexact semantically, to employ the language that Lisinski had "no legitimate claim to the property" of Patras. App. 6. Lisinski was vested by Patras with control over the funds and an understanding existed between the men as to the disposition of the funds.

It may be that Patras' actions, and by extension Lisinski's, were illegal under state law. But that does not constitute Lisinski an unlawful claimant to the funds vis-a-vis Patras for purposes of the Hobbs Act. Similarly, that the men's plans may have had criminal ramifications under state law does not warrant a finding that the petitioner was an extortionist. Were the case otherwise,

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according to Patras, solely was his. Nothing in the record suggests that the petitioner acted against Patras' interests once the latter requested aid.

any time a local crime was afoot, and to further the scheme one of the plotters was given property by a confederate, he would violate the Hobbs Act under the Seventh Circuit view that the nature of the transaction meant that the recipient had "no legitimate claim to the property."

Undoubtedly, too, under this view, the confederate who provided the property would be guilty of conspiring to violate the Act. The principle, an untenable one, would arise that under federal law a person has "no legitimate claim" to such of his property as he or she intends for use in the violation of local criminal laws.

CONCLUSION

WHEREFORE, for the above reasons, the petitioner respectfully requests this Court to grant his petition for a writ of certiorari.

Respectfully submitted,

Thomas D. Decker
135 South LaSalle Street
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(312)263-4180

June 1984

A P P E N D I X

Appendix

Appendix 1-12 - Court of Appeals Opinion

Appendix 13-14 - 4/2/84 Order of the Court of Appeals Denying Petition for Rehearing

Appendix 15-29 - Portion of Trial Transcript of 11/12/82

In the

United States Court of Appeals

For the Seventh Circuit

No. 83-1504

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DEAN J. LISINSKI,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 CR 490—Thomas R. McMillen, *Judge.*

ARGUED NOVEMBER 28, 1983—DECIDED FEBRUARY 21, 1984

Before CUMMINGS, *Chief Judge,* WOOD, *Circuit Judge,* and GRANT, *Senior District Judge.**

GRANT, *Senior District Judge.* Defendant-Appellant Dean J. Lisinski appeals his conviction of two counts of extortion and one count of attempted extortion in violation of the Hobbs Act, 18 U.S.C. § 1951 (1976). Lisinski raises three issues for our consideration:

I) Whether the evidence adduced at trial was insufficient to sustain the extortion conviction;

II) Whether the evidence at trial impermissibly amended the indictment;

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* Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

III) Whether the trial court abused its discretion in denying Lisinski's requests for the disclosure of grand jury material?

For the reasons stated below, we AFFIRM Lisinski's conviction on all counts.

Facts

In a four count indictment returned in September, 1982, Lisinski was charged with three counts of extortion and one count of attempted extortion by the wrongful use of fear of economic harm and under color of official right. The evidence at trial revealed that Louis Patras, the victim of Lisinski's extortionate demands, was the owner-operator of the William Tell II restaurant in Countryside, Illinois. In early 1980, the restaurant was in jeopardy of losing its liquor license because of an $82,000 Illinois sales tax liability. Because a liquor license was vital to the success of the restaurant, Patras contacted Lisinski, an acquaintance of his, for help. Lisinski worked for the Clerk of the Circuit Court of Cook County and had friends in the Illinois Liquor Control Commission and the Illinois Department of Revenue, the two agencies with whom Patras had to deal to retain his liquor license. Lisinski had previously told Patras that he had political influence and ". . . if you ever need anything from downtown, I will be able to help you."

On May 14, 1980, Lisinski accompanied Patras to a revocation hearing before the Liquor Control Commission and introduced Patras to its executive director, Jack Wallenda. Unbeknown to Patras, his liquor license was suspended that same day because of his substantial sales tax liability. On June 10, Lisinski took Patras once again to meet Wallenda. At that meeting, Wallenda told Lisinski and Patras that Patras' license had been "blocked." In Patras' presence, Lisinski told Wallenda to "unblock it." (R. 67-69). Wallenda did so and promptly issued Patras a new license. Several days later, Lisinski called Patras and demanded a thousand dollars ". . . to take care of

some people." Patras paid Lisinski the money. This transaction formed the basis of Count I of the indictment of which Lisinski was found not guilty.

Patras continued to experience liquor license difficulties. On April 3, 1981, approximately 1 and ½ months before his liquor license was to expire, Patras received a phone call from Lisinski. Lisinski told Patras that it was urgent that he make a $1,000 payoff to Wallenda. Patras balked and said that he did not have the money. Within the hour, two acquaintances of Lisinski called Patras and urged him to make the payoff. Patras succumbed and borrowed as much as he could—$500—which he paid to Lisinski (the $500 which Patras borrowed was ultimately repaid from restaurant funds.) Lisinski told him that the payoff of $500, which formed the basis of Count II of the indictment, might or might not be enough.

Following Lisinski's second demand for money, Patras contacted the FBI and permitted them to tape his dealings with Lisinski. Two further demands for money to assist with Patras' liquor license problems occurred. On May 29, 1981, two days before Patras' liquor license was due to expire, Lisinski telephoned Patras and demanded payment of the $500 remaining from the April 3 payment. Patras, fearful that his license would be permitted to expire, paid the additional $500. On July 24, 1981, Lisinski met with Patras at the William Tell and arranged for a final payment of $3,000. The FBI supplied Patras with $3,000 and witnessed Lisinski accepting the money.

The indictment alleged three counts of extortion corresponding to the June, April and May demands for money. Count IV of the indictment alleged attempted extortion because the funds used were obtained from the FBI. After a bench trial, Lisinski was found not guilty of Count I because the extortionate demand was not made until after Lisinski had assisted Patras to reacquire his liquor license. Lisinski was found guilty on Counts II, III and IV and brings this appeal.

I

Whether the evidence is insufficient to sustain the extortion conviction?

a). Necessity of a Threat?

Lisinski contends that an indispensable element of extortion by wrongful use of fear of economic harm is a threat, whether direct or indirect. Lisinski argues that the evidence at trial showed no threat and that Patras' fear of economic harm was self-generated. The government argues, on the other hand, that no threat is necessary. The government suggests that extortion by wrongful use of fear of economic harm is established by showing that the defendant preyed upon or exploited the victim's fear of economic harm. We agree.

Our analysis commences with the statute. *Mills v. United States*, 713 F.2d 1249, 1251 (7th Cir. 1983). The Hobbs Act provides:

> (a) *Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery* or *extortion* or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> (2) *The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of* actual or threatened force, violence, or *fear* or under color of official right.

(emphasis supplied) 18 U.S.C. § 1951 (1976).

"The Hobbs Act . . . is a broadly drawn statute. The cases construing the Act have repeatedly emphasized that the Congress, in passing the statute wanted to use all of the

constitutional power it had to punish interference with interstate commerce by extortion, robbery or physical violence." *United States v. Sander*, 615 F.2d 215, 218 (5th Cir.), *cert. denied*, 449 U.S. 835 (1980), citing *Stirone v. United States*, 361 U.S. 212, 215 (1960). This Circuit and others have long recognized that the term "fear" in the Hobbs Act includes fear of economic harm or loss. *See United States v. Dale*, 223 F.2d 181, 183 (7th Cir. 1955) ("We conclude that 'fear' as defined in the extortion section of the Anti-Racketeering Act should be given its ordinary meaning and consequently 'fear' would include fear of economic loss."); *United States v. Cusmano*, 659 F.2d 714 (6th Cir. 1981); *United States v. Forszt*, 655 F.2d 101 (7th Cir. 1981); *United States v. Gerald*, 624 F.2d 1291 (5th Cir. 1980), *cert. denied*, 450 U.S. 920 (1981).

Lisinski cites to *United States v. Enmons*, 410 U.S. 396 (1973) for the proposition that extortion by wrongful use of fear of economic harm requires a threat. *Enmons* involved a situation where striking union members used violent means to achieve legitimate labor ends. The Supreme Court, in finding no violation of the Hobbs Act, analysed the meaning of the word wrongful as used in the statute:

> . . . The term "wrongful" which on the face of the statute modifies the use of each of the enumerated means of obtaining property—actual or threatened force, violence, or fear—would be superfluous if it only served to describe the means used. . . . Rather, "wrongful" has meaning in the Act only if it limits the statute's coverage to those instances where the obtaining of the property would itself be "wrongful" because the alleged extortionist has no lawful claim to that property.

(footnote omitted) 410 U.S. at 399-400. Lisinski argues that since the Hobbs Act applies only to situations where *both* the defendant's ends and means are illegitimate, the wrongful use of fear requires a threat. Otherwise, concludes Lisinski, ". . . all entrepreneurs would be guilty

if their services or products were designed to respond to a consumer fear."

Lisinski totally misreads *Enmons*. *Enmons* is simply authority for the proposition that since all means of obtaining property which involve actual or threatened force, violence or fear are wrongful, "wrongful" means that the statute applies only to situations where the extortionist has no legitimate claim to the property. Otherwise, the use of the word "wrongful" in the statute would be redundant. *Enmons* does not constitute authority that the wrongful use of fear requires a threat.

Case law amply refutes Lisinski's arguments that the wrongful use of fear requires a threat. Exploitation of, or preying upon, the victim's fear constitutes wrongful use of fear and satisfies the statute. In *United States v. Crowley*, 504 F.2d 992 (7th Cir. 1974), the extortion victims were the owners of bowling lanes who paid off the defendant, a police officer, to protect their business. There, as here, the policeman was not responsible for the conditions which generated the victim's fear. But the policeman exploited that fear, and was convicted under the Hobbs Act:

> It is important to note that it is unnecessary for the government to prove that defendant actually created the fear in the minds of his victims. Rather, as the Court in *Callahan v. United States*, 223 F.2d 171, 174-176 (8th Cir. 1955), *cert. denied*, 350 U.S. 862, . . . held, *the exploitation of the victim's reasonable fear constitutes extortion regardless of whether or not the defendant was responsible for creating that fear and despite the absence of any direct threats.*

(emphasis supplied) 504 F.2d at 996; *See also United States v. Gerald*, 624 F.2d 1291, 1299 (5th Cir. 1980) ("In the instant case, the decisive question under 18 U.S.C. § 1951 (the Hobbs Act) is whether Gerald [the defendant] intended to cause Carter [the victim] to pay the $25,000 by exploiting Carter's fear of economic loss. . . . The fear need not have been actually caused by Gerald; the statute

is satisfied if Gerald intended to exploit that fear.") The Fifth Circuit noted in *United States v. Sander*, 615 F.2d 215, 218 (5th Cir. 1980):

> Appellant Sander argues that he never threatened Knapp, and consequently that the element of fear, a required element of the Hobbs Act, was not present. Fear of economic loss is covered by the Hobbs Act. The case law is also clear that the government did not have to show either that the fear was a direct consequence of the threat of economic loss or that Knapp personally feared Sander. *United States v. Quinn*, 514 F.2d 1250, 1266-67 (5th Cir. 1975), *cert. denied*, 424 U.S. 955, 96 S.Ct. 1430, 47 L.Ed.2d 361 (1976). Subtle extortions are covered under the Hobbs Act, and the government satisfied its burden of proof if it showed circumstances surrounding the alleged extortionate conduct that rendered the victim's fear of threatened loss reasonable.

See also United States v. Duhon, 565 F.2d 345, 351 (5th Cir.), *cert. denied*, 435 U.S. 952 (1978) ("In the present case, there is sufficient evidence to demonstrate the existence of a reasonable fear on the part of the victims and the requisite intent to exploit that fear.")

Here, looking at the evidence in a light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), more than adequate evidence was adduced to sustain Lisinski's extortion conviction. Patras reasonably feared the loss of his liquor license because loss of the license would put the William Tell restaurant out of business. Although Lisinski did not create the vulnerable position in which Patras found himself, he exploited and preyed upon Patras' fear. Patras reasonably believed that if he did not cooperate with Lisinski, he would lose his liquor license.

Lisinski argues that, although the cases cited by the government state that no "direct threat" or "threat" is necessary for the wrongful use of fear, either direct or implied threats were present in each of those cases. To a

certain extent, this is true. However, although no threat is necessary for the wrongful use of fear, by the very nature of extortion cases, threats—particularly "implied threats" will almost always be present. The implied threat will usually be that, unless the victim cooperates with the extortionist, economic loss will result. The extortionist need not be responsible for the situation in which the victim finds himself; what matters most are the ". . . circumstances surrounding the alleged extortionate conduct that rendered the victim's fear of threatened loss reasonable." *Sander, supra* at 218.

We conclude that the wrongful use of fear does not require a threat—although, in the victim's mind, the threat—usually implied—will be present. The wrongful use of fear is satisfied if the extortioner exploits the victim's fear of economic loss, as did Lisinski in this case. We hold that there was sufficient evidence to sustain Lisinski's extortion conviction.

b). Bribery, not Extortion.

Lisinski contends that this is a case of bribery, not extortion, because of the fact that Patras was willing to pay to influence official action and because there was no compulsion on Lisinski's part. This argument is routine in extortion cases and meritless on the facts of this case. Bribery and extortion are not mutually exclusive. *United States v. Price*, 617 F.2d 455 (7th Cir. 1979). "That such conduct may also constitute 'classic bribery' is not a relevant consideration." *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). Regardless of the fact that a prosecution for bribery might have been sustained, there exists more than adequate evidence to sustain Lisinski's extortion conviction. *See* section a, *supra*.

Lisinski also argues, relying upon an unpublished opinion of dubious precedential value, that since he was merely acting as Patras' agent, he is not liable for extortion. This is an imaginative—but equally unavailing—variation on the bribery argument. More to the point, it misrepre-

sents the evidence since it is obvious from the record that Lisinski was not acting as Patras' agent.

II

Whether the evidence at trial impermissibly amended the indictment?

Lisinski contends that the evidence at trial impermissibly amended the indictment. He notes that, although the indictment alleged that Lisinski affected interstate commerce by obtaining funds from Patras, the proof at trial showed that the funds for the extortionate payments came from the William Tell restaurant. Relying upon *United States v. Stirone*, 361 U.S. 212 (1960) and *United States v. Cusmano*, 659 F.2d 714, 718-19 (6th Cir. 1981), Lisinski concludes that his conviction must be set aside.

The rationale underlying the prohibition against amendments to the indictment at trial is that ". . . a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Stirone, supra* at 217. For example, in *Stirone*, the indictment alleged a Hobbs Act violation affecting the movement of sand in interstate commerce. At trial, however, the government presented evidence showing an effect upon interstate commerce with respect to *steel* as well as sand. The Supreme Court reversed Stirone's conviction, finding that the indictment had been impermissibly amended by the proof at trial. Likewise, in *United States v. Cusmano*, 659 F.2d 714 (6th Cir. 1981), the Sixth Circuit reversed Cusmano's conviction where the indictment alleged extortion by wrongful use of fear of economic harm while the evidence at trial showed extortion by threats of violence and physical harm.

While there was a variation between the evidence at trial and the allegations of the indictment, it hardly rises to the level of a constructive amendment of the indictment. "Variances which create 'a substantial likelihood' that a defendant may have been 'convicted of an offense other than that charged by the grand jury' constitute constructive amendments." *United States v. Beeler*, 587 F.2d

340, 342 (6th Cir. 1978). As this Circuit noted in *United States v. Warden*, 545 F.2d 32, 35 (7th Cir. 1976):

> . . . in order for a variance . . . to be fatal, the evidence offered must prove facts materially different from those alleged in the indictment; a variance will not be deemed fatal where the defendant is so informed of the charges against him that he is protected against a second prosecution for the same offense and is able adequately to prepare his defense against the charges set forth in the indictment.

(citations omitted).

Here, the facts adduced at trial simply explained the allegations of the indictment. At trial, Patras testified that the William Tell restaurant was a corporation owned by him and his wife and the liquor license application he completed reflected that he was the 100% owner of the restaurant. The money which Patras paid to Lisinski came from restaurant funds; the evidence at trial merely showed that the funds were funneled through Patras. There was not, nor could there be, any allegation that this minor variation interfered with Lisinski's trial preparation. He was fully aware of the charges against him. We hold that there was no constructive amendment of the indictment.

III

Whether the trial court abused its discretion in denying Lisinski's requests for the disclosure of grand jury material?

Lisinski contends that the district court erred in refusing to disclose grand jury transcripts to him, and that insufficient evidence was presented to the grand jury to sustain the indictment. Because we find that the district court properly refused Lisinski's request for the disclosure of grand jury transcripts, we need not address Lisinski's unsupported assertions that insufficient evidence was presented to the grand jury to sustain his indictment.

The original indictment of July 1982 charged Lisinski with extortion under color of official right. In September 1982, a superceding indictment was returned adding the allegation that the extortionate payments were induced by the wrongful use of fear of economic harm. The superceding indictment was returned by the same grand jury and without the presentation of additional evidence. Lisinski speculates that there was insufficient evidence to support his indictment and moved the district court for disclosure of grand jury transcripts. The district court, after examining the grand jury transcripts in camera, refused Lisinski's requests for disclosure of the transcripts.

Fed. R. Crim. P. 6(e)(3)(C)(i) & (ii) detail the circumstances under which grand jury proceedings may be disclosed:

> (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
>
> (i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or
>
> (ii) *when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.*
>
> If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(emphasis supplied). Lisinski relies upon *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979) as authority that disclosure is appropriate in this case since the need for disclosure outweighs the need for continued secrecy. We disagree.

"Rule 6(e) codifies the traditional practice of grand jury secrecy." *Matter of Grand Jury Proceedings, Miller Brewing Company*, 687 F.2d 1079, 1088 (7th Cir. 1982). "There is a presumption of regularity which attaches to such pro-

ceedings and the defendants have a difficult burden to prove any irregularity." *United States v. Battista*, 646 F.2d 237, 242 (6th Cir. 1981). Additionally, disclosure of grand jury proceedings will be had only upon demonstration by the party seeking disclosure of a "compelling necessity" or "a particularized need." *Miller Brewing Company, supra* at 1088 citing *Douglas Oil Co.*, 441 U.S. at 222-23. The standard of review of a district court's determination not to disclose grand jury proceedings is abuse of discretion since the ". . . court must exercise substantial discretion, weighing the need for secrecy against the need for disclosure of specified documents and testimony occurring before the grand jury." *Id.*

There was no abuse of discretion in this case. Against the time-honored and serious policy of grand jury secrecy, Lisinski proffers an unsupported speculation that, possibly, insufficient evidence was presented to the grand jury to sustain the indictment. Lisinski simply fails to overcome the presumption of regularity accorded to grand jury proceedings, or demonstrate the "compelling necessity" necessary to require disclosure of grand jury proceedings. Indeed, the district court which examined the grand jury transcripts *in camera* found them to be adequate. We hold that, for the reasons stated above, the district court properly denied Lisinski's request for the disclosure of grand jury transcripts.

Conclusion

Lisinski's conviction on all counts is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

April 2, 1984

Before
Hon. Walter J. Cummings, Chief Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Robert A. Grant, Senior District Judge*

United States of America, Plaintiff-Appellee,	) Appeal from the U.S. Dist. Court for the Northern District of Ill., Eastern Division.
vs.	)
No. 83-1504	)
	) No. 82 CR 490
Dean Lisinski, Defendant-Appellant.	) Thomas R. McMillen Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

have voted to deny a rehearing.

Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
vs.	)	No. 82 CR 490
DEAN J. LISINSKI.	)	83-1504
Defendant.	)	

Before the Hon. Thomas R. McMillen on Friday, November 12, 1982, at the hour of 10:00 o'clock a.m.

The trial resumed pursuant to adjournment.

Appearances: Mr. Keith C. Syfert and
Mr. David Stetler,
on behalf of the Plaintiff;

Mr. Thomas Decker,
Ms. Mary Katharine Ryan and
Mr. Robert Handelsman,
on behalf of the Defendant.

MR. SYFERT: No. There were other payments made to Mr. Lisinski for other reasons other than the liquor license but those are not charged in this indictment. They were introduced as similar acts evidence only.

THE COURT: Well, as I say, I do not believe that it would be a proper construction of Section 1951 to find beyond a reasonable doubt that Mr. Lisinski was acting under color of official right even though he was influencing persons that were acting color of official right. I think the statute must apply to the individual being charged. I cannot in my own mind rationalize that. Therefore, I would not find him guilty of that alternative charge in any of the counts.

Also, I have difficulty rationalizing an extortion payment after the fact has been accomplished that the extortion

was allegedly made for.

What happened in Count 1, as I understand the evidence, is that the license was, I believe it was reinstated. I checked my notes on that. I think he came -- that is, Patras came to Mr. Lisinski and said, "I need some help," and Mr. Lisinski agreed that he would do things and he did those things or the liquor license, I believe, was reinstated. Actually, I believe, Mr. Lisinski in this instance filled out part of it. Is that Exhibit 4? Yes.

MR. SYFERT: Yes, it is, your Honor.

THE COURT: And took it down, or was there at the time it was submitted. Then it was some several days -- actually six days -- six or seven days thereafter that Mr. Lisinski said that he had to take care of somebody and requested $1,000. That was the beginning of the whole series

p. 43

of transactions, which I have difficulty in finding constituted extortion.

Although the government argues that the extortion was out of fear that something was going to happen in the future, I don't see any such conversationg [sic] about that. Maybe that was in Mr. Patras' mind and maybe it wasn't. But it was a whole year almost -- let's see -- it was April, six months later that the matter came to a head again, and that is when Mr. Lisinski said he had to get $1,000 on April 3, 1981 to take care of the, I believe, possibility that the liquor license was going to be -- well, I guess the liquor license had been revoked at that time.

But to counter Mr. Decker's contention that Mr. Patras was the motivating individual or force in this transaction, it seems to me that the fact that Mr.

Lisinski came to Mr. Patras after the fact, in October of 1980, and said he needed $1,000 to take care of somebody sets the stage for what happened not only at that time but for what happened in the future.

After all, Mr. Patras was given to understand that these things couldn't be done without paying somebody. It stands to reason that he wasn't going to pay anybody if he didn't have to. Granted he went around paying people for things that he had to do in order to accomplish his means in other instances besides this. He was a person that was perfectly willing to do that but, on the other hand, he wasn't p. 44 going to do it if he didn't have to. It was Mr. Lisinski who brought the question up in the first instance.

MR. DECKER: Well, Mr. Patras said he expected to pay. That was his state of

mind, his intent.

THE COURT: Expected to pay on the first instance?

MR. DECKER: He expected to pay when he went to Mr. Lisinski in May of 1980. He did not limit his expectation in terms of time. Presumably it extended throughout the period of his problem.

THE COURT: Well, it seems to me that it is fairly clear that he wouldn't have paid, he wouldn't have taken the money out of the till or the restaurant, particularly when the restaurant was in financial difficulties, if he didn't feel that he had to in order to accomplish what he had to do.

MR. DECKER: I think that is right but that would be true of any briberty, [sic] wouldn't it, your Honor.

THE COURT: It would be true of a bribery but it would also be true of a

person that is being subjected to extortion.

MR. DECKER: That is right.

THE COURT: I would say the situation would be, perhaps, different but we only have to deal with the facts that are in the record. It might have been different had Mr. Lisinski said to -- excuse me -- if Mr. Patras had said to Mr. Lisinski, "I want to get my liquor license reinstated and I want you to help me. I'm going to ask you to give somebody $1,000 to accomplish that." But that isn't the way it happened. It happened just the other way around. He asked him if he p. 45 could help, Mr. Lisinski's help, and then Mr. Lisinski said I have to have $1,000 in order to confirm what has happened here or to pay off whoever did it, and he gave him the $1,000. I don't consider that particular transaction to have been extortion,

frankly. As I said before, I have a logical problem in saying that you can extort something from somebody after the fact, after the official act has been accomplished. Because you don't have any fear at that time, economic fear, that anything is going to happen to you. You have already gotten your license restored.

So, I think that Mr. Lisinski has not been properly charged under Count 1 and I would find him not guilty under Count 1.

However, as I said before, that lays the pattern and the groundwork for what happened in the future and every time that something came up and Mr. Patras went to Mr. Lisinski or even when Mr. Lisinski came to him there was knowledge that someone had to have some money in order to accomplish this. At least Mr. Patras thought somebody ought to have some money.

I don't believe that the distinction between economic harm to the William Tell Corporation or the restaurant as an entity can be successfully distinguished from economic harm to Mr. Patras, which is what is charged in the indictment. Mr. Patras had all of his time, all of his energy, all of his assets, if he had any net assets, committed to these two restaurants and the William Tell II was the one that was in trouble. In fact, I don't know what happened to the first restaurant, whether it was even still in existence. Whether it was or not, the economic harm that he was afraid of was William Tell II was going to be put out of business by not having a liquor license. I can't follow or, at least, I can't accept Mr. Decker's argument that there are two separate entities here that were fearing economic harm and that therefore, since the jury

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did not charge economic harm to William Tell II there is a fatal variance or an amendment, as you call it, to the indictment by proof.

It seems to me that the economic harm that was feared was clearly that in the mind of Mr. Patras and it came through the William Tell II as an entity but, nevertheless, was Mr. Patras' fear. In fact, it would be a little difficult to imagine a corporation as an entity having a fear apart from its owner and apart from its owner and apart from its president.

I suppose that is the reason you object to the evidence about interstate commerce with respect to alcoholic beverages.

MR. DECKER: Yes.

THE COURT: From what I have said I don't believe that is a distinction that makes any difference as far as the law

is concerned in this case.

I think I have answered all of your questions, Mr. Decker, or at least all of your arguments on the basis of the evidence.

To be specific, I find that the government has proved paragraphs 1 and 2 of Count 1 beyond a reasonble doubt, which has to do with the financial interest of Mr. Patras in the William Tell II Restaurant, which is not identified as a corporation but which is identified by name, and the process for which liquor licenses were obtained. That all is alleged in paragraph 1 of Count 1, which is incorporated in Count 2. p. 47

Paragraph 2 is an allegation of the original liquor license and the purchase of liquor through interstate commerce, which I believe has been proved beyond a reasonable doubt.

Then passing on to paragraph 2 of Count 2, there is no question about the payment. As a matter of fact, it hasn't been denied as to the $1,000 which was asked for and paid by Louis Patras on April 3, 1981 to Dean Lisinski in order to help keep the liquor license for the William Tell Restaurant and that the defendant, therefore, knowingly and unlawfully obtained $500 from Louis Patras, which was not due to him or to the Liquor Control Commission and was obtained from Louis Patras based on consent of being induced by the wrongful use of fear of economic harm.

So, I will find Mr. Lisinski guilty beyond a reasonable doubt of Count 2.

The same two paragraphs of Count 1 are incorporated in Count 3, which I have already found have been proved beyond a reasonable doubt. Paragraph 2 is the

demand of $500 on May 29, 1981. It is alleged that Mr. Lisinski wrongfully and unlawfully obtained the $500 from Louis Patras, which was obtained from him based on consent being induced by the wrongful use of fear of economic harm. There, again, is no dispute that the payment was made. It is my finding that it was made because of a fear of economic harm. Therefore, I will find Mr. Lisinski guilty on Count 3. p. 48

Count 4 is the same except for the admitted fact the $3,000 did not come from Mr. Patras or from William Tell. However, unbeknownst to Mr. Lisinski it was requested from Mr. Patras and he attempted to obtain it from Mr. Patras under fear of wrongful use of economic harm and, although it was not actually an interference with interstate commerce and it was not actually a payment which Mr. Patras

or William Tell made itself, the $3,000 was an attempt to commit the crime of extortion. I will find Mr. Lisinski guilty on Count 4 of the indictment.

So, I will direct the Clerk to enter a finding of not guilty on Count 1 and guilty on Counts 2, 3 and 4 of the indictment.

I will let the government have these exhibits back which I have. I guess that would include the transcript because they don't need to be filed in the court record. I presume they are already in the transcript of the court reporter's notes.

MR. STETLER: I don't believe they were your Honor. I didn't notice the stenographer taking notes at the time.

THE COURT: Wasn't she?

MR. STETLER: We will have a clear record for the Court of Appeals because the exhibits are clearly marked, the

transcripts.

MR. DECKER: In order to prepare post trial motions, your Honor, I will order a copy of the proceedings today and for that reason would request thirty days for post trial motions.

THE COURT: All right. I can set a date for a hearing in . . . .